A

## LEOLARIS (M) SDN BHD

**v.**

## BUMIPUTRA COMMERCE BANK BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D5-22-219-2003]
14 AUGUST 2012

C

***BANKING:*** *Banker and customer - Forgery - Forgery of company's cheques - Regulation of cheques by authorised person unsupervised - Bank honoured cheques forged by authorised person - Contractual obligation of customer to check account statements - Whether customer should have objected - No indication of non-receival of statements of account - Whether*

D

*customer breached express term in monthly statement of account - Whether banker protected by s. 73A of Bills of Exchange Act 1949 and relieved from liability*

E

The plaintiff was an account holder of the defendant bank and the responsibilities of keeping and drawing of cheques were entrusted to the plaintiff's corporate administrator, without any supervision. It was mandated that cheques amounting to RM5,000 were to be signed by one director while those exceeding RM5,000 were to be signed by two directors. For the period of 15 and a half months,

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between 4 January 2001 and 17 April 2002, the defendant honoured 248 cheques from the plaintiff's current account which amounted to RM1,091,921.78. The cheques honoured were for the mandated sum, except for one in the sum of RM35,357. *Vide* cl. 4 of the account application form, the plaintiff agreed to examine

G

the account statements sent and to notify the bank of any errors, irregularities or discrepancies in the account statement or in the event they fail to receive their monthly statements. Monthly bank statements were sent to two of the plaintiff's addresses but none of the statements were returned to the defendant, signifying that

H

the plaintiff had received them. To boot, there was no objection by the plaintiff within that 15 and a half months period. In July 2002, fraud was discovered when the corporate administrator allegedly forged the signature of one of the authorised signatories who was also a director of the plaintiff. In the present suit, the

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plaintiff claimed against the defendant for honouring forged cheques worth RM1,091,921.78 and debiting the same into the plaintiff's account. The issues to be addressed by the court were: (i) whether the statutory defence under s. 73A of the Bills of Exchange Act

1949 ('the Act') would come to the defendant's aid; and (ii) whether the plaintiff's breach of express term in the monthly statement of account relieved the defendant from any liability. A

**Held (allowing plaintiff's claim in part with no order as to costs):** B

**(1)** The *raison d'être* of s. 73A of the Act was to introduce statutory defence to the bank in cases of negligent contribution as opposed to negligence *per se*. If the bank could show that there was in fact negligent contribution by the customer, depending on the circumstances of the case and that the bank had paid out in good faith, s. 73A of the Act would provide an absolute defence. The cheque honoured for the sum of RM35,357 did not have the two signatories required and it was a breach of the mandate given by the plaintiff to the defendant. Consequently, the defendant was liable to reimburse the same with interest and the defence under s. 73A of the Act did not aid the defendant. (para 11) C D

**(2)** Section 73A of the Act had directly and/or indirectly brought in a wider concept of duty which required a customer to take reasonable precautions in managing his business to prevent forgery and also a duty to check periodical bank statements and alert the bank to arrest forgery at the earliest opportunity failing which the bank may succeed in invoking the s. 73A defence. (para 11) E F

**(3)** There was sufficient evidence that the monthly bank statements were regularly sent. There was also a contractual obligation in express term for the plaintiff to examine the statement of account and to notify the bank of any errors, irregularities or discrepancies. A similar reminder was also stated in the monthly bank statements. It was clearly evident that despite the contractual obligation, the plaintiff failed to take reasonable precautions in the management of its business to prevent continuing forgery and to alert the bank in order to avoid the defence of s. 73A of the Act by the bank. (para 11) G H

**(4)** The court would agree with the defendant that the plaintiff had knowingly or negligently contributed or facilitated the forgery and thus made out a case to rely on one part of the statutory defence encapsulated in s. 73A of the Act. The I

defendant had a system in place and had conducted themselves as a reasonable and prudent banker dealing with day-to-day affairs of the plaintiff's account's operation, taking into account all the circumstances of the case whereby the corporate administrator was not an unknown person to both the plaintiff and the defendant. This was also supplemented by the fact that the Act placed a low threshold for the defendant to satisfy when the term good faith was relied upon. (para 11)

**Case(s) referred to:**

*Auchteroni & Co v. Midland Bank, Ltd [1928] All ER Rep 627* ***(refd)***

*Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad [2011] 1 LNS 414 HC* ***(refd)***

*Jones v. Gordon (1877) 2 App Cas 616* ***(refd)***

*Khoo Tian Hock & Anor v. Oversea-Chinese Banking Corporation Limited [2000] 4 SLR 673* ***(refd)***

*Leolaris (M) Sdn Bhd v. RHB Bank Bhd [2009] 10 CLJ 248* ***(refd)***

*Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd [2012] 4 CLJ 997 HC* ***(refd)***

*Skyring v. Greenwood (1825) 4 B & C 281* ***(refd)***

*Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others [1985] 2 All ER 947* ***(refd)***

*United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC* ***(refd)***

**Legislation referred to:**

Bills of Exchange Act 1949, ss. 24, 73A, 95

**Other source(s) referred to:**

*Tannan's Banking Law and Practice in India*, 22nd edn, 2008, pp 411, 520

*For the plaintiff - R S Sodhi; M/s Sukhdev & Co*

*For the defendant - Wong Hok Mun (Arham Rahimy Hariri with him); M/s Azim, Tunku Farik & Wong*

*Reported by Najib Tamby*

## JUDGMENT

**Hamid Sultan Abu Backer J:**

**[1]** This is my judgment in respect of the plaintiff's claim against the defendant for honouring forged cheques, and debiting the same in the plaintiff's account. The relevant part of the statement of claim, *inter alia*, reads as follows:

3. The terms of the contract (hereinafter referred to as the said contract) between the Plaintiff and the Defendant in respect of the opening of the current account referred to in paragraph 2 above are *inter alia* as follows:

3.1 Express Terms

(a) that the authorised signatories of cheques drawn by the plaintiff are Gordon Stuart Bell, William Leslie Addington, John E. Dixon and Ling Hee Kiat and

(b) that the signatories for cheques drawn by the Plaintiff for RM5,000 and below would be any one of the four authorised signatories and for cheques in excess of RM5,000/- would be any two of the four authorised signatories.

3.2 Implied Terms

(a) that the defendant shall protect the Plaintiff from being defrauded and

(b) that the defendant shall only make payments on cheques which are regular and unambigous in form.

4. The Defendant paid the following cheques purported to be drawn by the Plaintiff and debited the plaintiff's accounts with the amount thereof:

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 1. | 146515 | 2/1/2001 | 4/1/2001 | 3,219.23 | Siew Mei Chuen |
| 2. | 150283 | 10/1/2001 | 12/1/2001 | 3,702.32 | Siew Mei Chuen |
| 3. | 150296 | 15/1/2001 | 17/1/2001 | 4,559.50 | Siew Mei Chuen |
| 4. | 150300 | 17/1/2001 | 18/1/2001 | 1,070.00 | Cash |
| 5. | 150752 | 18/1/2001 | 20/1/2001 | 3,357.00 | Cash |
| 6. | 158703 | 29/1/2001 | 31/1/2001 | 740.00 | Cash |
| 7. | 158738 | 12/2/2001 | 13/2/2001 | 4,520.00 | Multimedia Station Centre |
| 8. | 158743 | 13/2/2001 | 14/2/2001 | 4,761.23 | Cash |
| 9. | 158746 | 14/2/2001 | 15/2/2001 | 4,470.00 | Multimedia Station Centre |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 10. | 158706 | 3/2/2001 | 5/2/2001 | 4,190.00 | Multimedia Station Centre |
| 11. | 158707 | 3/2/2001 | 5/2/2001 | 4,190.00 | Multimedia Station Centre |
| 12. | 158771 | 19/2/2001 | 20/2/2001 | 2,600.00 | Multimedia Station Centre |
| 13. | 158789 | 20/2/2001 | 21/2/2001 | 4,500.00 | Cash |
| 14. | 167052 | 1/3/2001 | 2/3/2001 | 3,200.00 | Cash |
| 15. | 167062 | 8/3/2001 | 9/3/2001 | 1,800.00 | Cash |
| 16. | 167075 | 12/3/2001 | 12/3/2001 | 4,131.00 | Siew Mei Chuen |
| 17. | 167074 | 12/1/2001 | 12/3/2001 | 4,131.00 | Siew Mei Chuen |
| 18. | 167079 | 12/1/2001 | 13/3/2001 | 2,000.00 | Multimedia Station Centre |
| 19. | 167082 | 16/3/2001 | 16/3/2001 | 3,781.43 | Siew Mei Chuen |
| 20. | 173631 | 21/3/2001 | 22/3/2001 | 4,140.00 | Multimedia Station Centre |
| 21. | 173632 | 21/3/2001 | 22/3/2001 | 1,710.00 | Multimedia Station Centre |
| 22. | 173691 | 2/4/2001 | 2/4/2001 | 4,800.00 | Cash |
| 23. | 173694 | 2/4/2001 | 4/4/2001 | 4,200.00 | Siew Mei Chuen |
| 24. | 173693 | 2/4/2001 | 4/4/2001 | 3,324.00 | Siew Mei Chuen |
| 25. | 177752 | 9/4/2001 | 10/4/2001 | 3,397.00 | Siew Mei Chuen |
| 26. | 177754 | 10/4/2001 | 13/4/2001 | 3,200.00 | Formico Sdn Bhd |
| 27. | 177753 | 10/4/2001 | 13/4/2001 | 3,200.00 | Formico Sdn Bhd |
| 28. | 177770 | 18/4/2001 | 19/4/2001 | 5,000.00 | Cash |
| 29. | 177771 | 18/4/2001 | 19/4/2001 | 4,970.00 | Cash |
| 30. | 177769 | 18/4/2001 | 19/4/2001 | 3,560.00 | Multimedia Station Centre |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 31. | 187204 | 24/4/2001 | 26/4/2001 | 3,800.00 | Formico Sdn Bhd |
| 32. | 187203 | 24/4/2001 | 26/4/2001 | 3,800.00 | Formico Sdn Bhd |
| 33. | 187212 | 30/4/2001 | 30/4/2001 | 4,950.00 | Cash |
| 34. | 187211 | 30/4/2001 | 30/4/2001 | 4,950.00 | Cash |
| 35. | 187217 | 2/5/2001 | 2/5/2001 | 4,200.00 | Cash |
| 36. | 187210 | 1/5/2001 | 2/5/2001 | 3,000.00 | Reapfield Properties Sdn Bhd |
| 37. | 187208 | 1/5/2001 | 2/5/2001 | 5,000.00 | Reapfield Properties Sdn Bhd |
| 38. | 187209 | 1/5/2001 | 2/5/2001 | 5,000.00 | Reapfield Properties Sdn Bhd |
| 39. | 187214 | 2/5/2001 | 3/5/2001 | 1,970.00 | Reapfield Properties Sdn Bhd |
| 40. | 187215 | 2/5/2001 | 3/5/2001 | 3,980.00 | Multimedia Station Centre |
| 41. | 187213 | 2/5/2001 | 3/5/2001 | 5,000.00 | Reapfield Properties Sdn Bhd |
| 42. | 187202 | 4/6/2001 | 8/5/2001 | 3,260.21 | Cash |
| 43. | 187220 | 5/5/2001 | 8/5/2001 | 2,660.00 | Multimedia Station Centre |
| 44. | 187219 | 5/5/2001 | 8/5/2001 | 3,400.00 | Cash |
| 45. | 187218 | 5/5/2001 | 8/5/2001 | 2,700.00 | Cash |
| 46. | 187243 | 10/5/2001 | 11/5/2001 | 5,000.00 | Siew Mei Chuen |
| 47. | 187242 | 10/5/2001 | 11/5/2001 | 5,000.00 | Siew Mei Chuen |
| 48. | 187244 | 10/5/2001 | 11/5/2001 | 3,250.00 | Cash |
| 49. | 187460 | 16/5/2001 | 18/5/2001 | 5,000.00 | Siew Mei Chuen |
| 50. | 187459 | 15/5/2001 | 18/5/2001 | 4,770.80 | Siew Mei Chuen |
| 51. | 187461 | 16/5/2001 | 18/5/2001 | 2,500.00 | Cash |
| 52. | 187479 | 21/5/2001 | 22/5/2001 | 3,000.00 | Cash |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 53. | 187480 | 22/5/2001 | 23/5/2001 | 3,249.00 | Cash |
| 54. | 187462 | 10/5/2001 | 22/5/2001 | 1,060.00 | Multimedia Station Centre |
| 55. | 187489 | 26/5/2001 | 28/5/2001 | 3,651.60 | Siew Mei Chuen |
| 56. | 187312 | 1/6/2001 | 5/6/2001 | 1,700.00 | Cash |
| 57. | 187308 | 2/6/2001 | 5/6/2001 | 4,500.00 | Cash |
| 58. | 187310 | 1/6/2001 | 5/6/2001 | 5,000.00 | Cash |
| 59. | 187311 | 1/6/2001 | 5/6/2001 | 5,000.00 | Cash |
| 60. | 187304 | 1/6/2001 | 5/6/2001 | 500.00 | Chan Koo Yeng |
| 61. | 187306 | 1/6/2001 | 5/6/2001 | 3,800.00 | Cash |
| 62. | 187302 | 1/6/2001 | 5/6/2001 | 5,000.00 | Chan Koo Yeng |
| 63. | 187313 | 5/6/2001 | 6/6/2001 | 5,000.00 | Cash |
| 64. | 187314 | 5/6/2001 | 6/6/2001 | 5,000.00 | Cash |
| 65. | 187321 | 7/6/2001 | 7/6/2001 | 5,000.00 | Cash |
| 66. | 187320 | 6/6/2001 | 8/6/2001 | 2,200.00 | Cash |
| 67. | 187322 | 6/6/2001 | 8/6/2001 | 2,700.00 | Cash |
| 68. | 187323 | 9/6/2001 | 11/6/2001 | 1,700.00 | Siew Mei Chuen |
| 69. | 187316 | 6/6/2001 | 12/6/2001 | 3,200.00 | Formico Sdn Bhd |
| 70. | 187317 | 6/6/2001 | 12/6/2001 | 3,200.00 | Formico Sdn Bhd |
| 71. | 187318 | 6/6/2001 | 12/6/2001 | 3,800.00 | Formico Sdn Bhd |
| 72. | 187319 | 6/6/2001 | 12/6/2001 | 3,800.00 | Formico Sdn Bhd |
| 73. | 187324 | 11/6/2001 | 13/6/2001 | 3,210.00 | Cash |
| 74. | 187442 | 14/6/2001 | 15/6/2001 | 4,780.00 | Cash |
| 75. | 187326 | 13/6/2001 | 15/6/2001 | 4,600.00 | Formico Sdn Bhd |
| 76. | 187445 | 15/6/2001 | 19/6/2001 | 4,780.00 | Siew Mei Chuen |
| 77. | 199212 | 26/6/2001 | 26/6/2001 | 4,600.00 | Cash |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 78. | 199185 | 26/6/2001 | 27/6/2001 | 4,400.00 | Premium Connection Ent. |
| 79. | 187328 | 28/6/2001 | 29/6/2001 | 3,892.00 | Cash |
| 80. | 187327 | 28/6/2001 | 29/6/2001 | 4,891.23 | Siew Mei Chuen |
| 81. | 187332 | 28/6/2001 | 29/6/2001 | 500.00 | Chan Koo Yeng |
| 82. | 187329 | 28/6/2001 | 29/6/2001 | 5,000.00 | Chan Koo Yeng |
| 83. | 199222 | 4/7/2001 | 4/7/2001 | 4,800.00 | Siew Mei Chuen |
| 84. | 199229 | 5/7/2001 | 6/7/2001 | 5,000.00 | Siew Mei Chuen |
| 85. | 199227 | 5/7/2001 | 6/7/2001 | 4,560.00 | Cash |
| 86. | 199228 | 5/7/2001 | 6/7/2001 | 5,000.00 | Siew Mei Chuen |
| 87. | 199241 | 13/7/2001 | 16/7/2001 | 4,560.00 | Premium Connection Ent. |
| 88. | 199242 | 16/7/2001 | 17/7/2001 | 4,700.00 | Siew Mei Chuen |
| 89. | 199257 | 17/7/2001 | 19/7/2001 | 3,700.00 | Cash |
| 90. | 206958 | 25/7/2001 | 25/7/2001 | 5,000.00 | Cash |
| 91. | 206959 | 25/7/2001 | 25/7/2001 | 5,000.00 | Cash |
| 92. | 206960 | 25/7/2001 | 26/7/2001 | 5,000.00 | Cash |
| 93. | 206961 | 25/7/2001 | 26/7/2001 | 2,000.00 | Cash |
| 94. | 276002 | 1/8/2001 | 3/8/2001 | 3,800.00 | Cash |
| 95. | 276001 | 1/8/2001 | 3/8/2001 | 4,200.00 | Siew Mei Chuen |
| 96. | 206977 | 1/8/2001 | 3/8/2001 | 3,270.00 | Premium Connection Ent. |
| 97. | 206978 | 1/8/2001 | 3/8/2001 | 3,390.00 | Premium Connection Ent. |
| 98. | 206996 | 1/8/2001 | 9/8/2001 | 5,000.00 | Cash |
| 99. | 206975 | 1/8/2001 | 9/8/2001 | 5,000.00 | Hor Kok Hen |
| 100. | 206997 | 4/8/2001 | 10/8/2001 | 5,000.00 | Siew Mei Chuen |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 101. | 280013 | 13/8/2001 | 14/8/2001 | 5,000.00 | Siew Mei Chuen |
| 102. | 207000 | 10/8/2001 | 14/8/2001 | 1,980.00 | Cash |
| 103. | 206993 | 1/8/2001 | 14/8/2001 | 3,800.00 | Formico Sdn Bhd |
| 104. | 206995 | 1/8/2001 | 14/8/2001 | 4,800.00 | Formico Sdn Bhd |
| 105. | 206976 | 1/8/2001 | 16/8/2001 | 500.00 | Chan Koo Yeng |
| 106. | 280001 | 13/8/2001 | 16/8/2001 | 2,000.00 | Cash |
| 107. | 280012 | 13/8/2001 | 16/8/2001 | 5,000.00 | Chan Koo Yen |
| 108. | 280014 | 13/8/2001 | 17/8/2001 | 5,000.00 | Siew Mei Chuen |
| 109. | 280028 | 17/8/2001 | 20/8/2001 | 5,000.00 | Siew Mei Chuen |
| 110. | 280029 | 17/8/2001 | 20/8/2001 | 5,000.00 | Siew Mei Chuen |
| 111. | 276038 | 20/8/2001 | 21/8/2001 | 5,000.00 | Siew Mei Chuen |
| 112. | 276039 | 20/8/2001 | 21/8/2001 | 5,000.00 | Siew Mei Chuen |
| 113. | 276040 | 20/8/2001 | 22/8/2001 | 4,180.00 | Premium Connection Ent. |
| 114. | 280083 | 23/8/2001 | 24/8/2001 | 5,000.00 | Cash |
| 115. | 280084 | 23/8/2001 | 27/8/2001 | 5,000.00 | Siew Mei Chuen |
| 116. | 280085 | 23/8/2001 | 27/8/2001 | 5,000.00 | Siew Mei Chuen |
| 117. | 280087 | 28/8/2001 | 29/8/2001 | 5,000.00 | Siew Mei Chuen |
| 118. | 280088 | 28/8/2001 | 29/8/2001 | 5,000.00 | Siew Mei Chuen |
| 119. | 280089 | 28/8/2001 | 29/8/2001 | 5,000.00 | Siew Mei Chuen |
| 120. | 280091 | 28/8/2001 | 30/8/2001 | 5,000.00 | Cash |
| 121. | 280092 | 28/8/2001 | 30/8/2001 | 5,000.00 | Cash |
| 122. | 206999 | 10/8/2001 | 11/8/2001 | 35,357.00 | Topclass Supply Sdn Bhd |
| 123. | 293510 | 4/9/2001 | 5/9/2001 | 5,000.00 | Siew Mei Chuen |
| 124. | 293511 | 4/9/2001 | 5/9/2001 | 5,000.00 | Siew Mei Chuen |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 125. | 293503 | 3/9/2001 | 5/9/2001 | 3,800.00 | Formico Sdn Bhd |
| 126. | 293502 | 3/9/2001 | 5/9/2001 | 4,800.00 | Formico Sdn Bhd |
| 127. | 293513 | 4/9/2001 | 6/9/2001 | 500.00 | Chan Koo Yeng |
| 128. | 293512 | 4/9/2001 | 6/9/2001 | 5,000.00 | Chan Koo Yeng |
| 129. | 293520 | 4/9/2001 | 8/9/2001 | 2,480.00 | Premium Connection Ent. |
| 130. | 293521 | 4/9/2001 | 10/9/2001 | 3,000.00 | Cash |
| 131. | 293522 | 10/9/2001 | 11/9/2001 | 5,000.00 | Siew Mei Chuen |
| 132. | 293523 | 10/9/2001 | 11/9/2001 | 5,000.00 | Siew Mei Chuen |
| 133. | 293527 | 17/9/2001 | 18/9/2001 | 5,000.00 | Siew Mei Chuen |
| 134. | 293528 | 17/9/2001 | 18/9/2001 | 5,000.00 | Siew Mei Chuen |
| 135. | 293529 | 17/9/2001 | 18/9/2001 | 5,000.00 | Siew Mei Chuen |
| 136. | 293530 | 17/9/2001 | 24/9/2001 | 5,000.00 | Siew Mei Chuen |
| 137. | 293531 | 17/9/2001 | 24/9/2001 | 5,000.00 | Siew Mei Chuen |
| 138. | 293526 | 10/9/2001 | 27/9/2001 | 1,645.00 | Cash |
| 139. | 293524 | 10/9/2001 | 27/9/2001 | 3,800.00 | Formico Sdn Bhd |
| 140. | 293525 | 10/9/2001 | 27/9/2001 | 4,800.00 | Formico Sdn Bhd |
| 141. | 293534 | 2/10/2001 | 5/10/2001 | 5,000.00 | Siew Mei Chuen |
| 142. | 293535 | 2/10/2001 | 5/10/2001 | 5,000.00 | Siew Mei Chuen |
| 143. | 293536 | 10/10/2001 | 12/10/2001 | 5,000.00 | Siew Mei Chuen |
| 144. | 293537 | 10/10/2001 | 12/10/2001 | 5,000.00 | Siew Mei Chuen |
| 145. | 293538 | 15/10/2001 | 16/10/2001 | 5,000.00 | Siew Mei Chuen |
| 146. | 293539 | 15/10/2001 | 16/10/2001 | 5,000.00 | Siew Mei Chuen |
| 147. | 293540 | 15/10/2001 | 16/10/2001 | 5,000.00 | Siew Mei Chuen |
| 148. | 293543 | 22/10/2001 | 23/10/2001 | 4,200.00 | Cash |
| 149. | 293541 | 22/10/2001 | 23/10/2001 | 5,000.00 | Siew Mei Chuen |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 151. | 293544 | 23/10/2001 | 24/10/2001 | 4,500.00 | Premium Connection Ent. |
| 152. | 293546 | 23/10/2001 | 26/10/2001 | 4,731.23 | Juliana Siew |
| 153. | 293545 | 29/10/2001 | 1/11/2001 | 5,000.00 | Siew Mei Chuen |
| 154. | 293547 | 29/10/2001 | 1/11/2001 | 5,000.00 | Siew Mei Chuen |
| 155. | 293548 | 29/10/2001 | 1/11/2001 | 5,000.00 | Siew Mei Chuen |
| 156. | 293549 | 5/11/2001 | 5/11/2001 | 5,000.00 | Siew Mei Chuen |
| 157. | 293550 | 5/11/2001 | 5/11/2001 | 5,000.00 | Siew Mei Chuen |
| 158. | 187333 | 19/11/2001 | 19/11/2001 | 5,000.00 | Siew Mei Chuen |
| 159. | 187334 | 19/11/2001 | 19/11/2001 | 5,000.00 | Siew Mei Chuen |
| 160. | 187339 | 28/11/2001 | 28/11/2001 | 5,000.00 | Siew Mei Chuen |
| 161. | 187340 | 28/11/2001 | 28/11/2001 | 5,000.00 | Siew Mei Chuen |
| 162. | 187337 | 29/11/2001 | 30/11/2001 | 5,000.00 | Siew Mei Chuen |
| 163. | 187341 | 5/11/2001 | 6/12/2001 | 5,000.00 | Siew Mei Chuen |
| 164. | 187342 | 5/11/2001 | 6/12/2001 | 5,000.00 | Siew Mei Chuen |
| 165. | 187343 | 5/11/2001 | 6/12/2001 | 5,000.00 | Siew Mei Chuen |
| 166. | 187346 | 11/12/2001 | 12/12/2001 | 5,000.00 | Siew Mei Chuen |
| 167. | 187347 | 11/12/2001 | 12/12/2001 | 5,000.00 | Siew Mei Chuen |
| 168. | 187348 | 11/12/2001 | 12/12/2001 | 5,000.00 | Siew Mei Chuen |
| 169. | 187344 | 11/12/2001 | 12/12/2001 | 5,000.00 | Chan Koo Yen |
| 170. | 292451 | 28/12/2001 | 31/12/2001 | 5,000.00 | Siew Mei Chuen |
| 171. | 292452 | 28/12/2001 | 31/12/2001 | 5,000.00 | Siew Mei Chuen |
| 172. | 292453 | 28/12/2001 | 31/12/2001 | 5,000.00 | Siew Mei Chuen |
| 173. | 187349 | 29/12/2001 | 31/12/2001 | 4,700.00 | The PCE Shop |
| 174. | 292454 | 31/12/2001 | 2/1/2002 | 2,250.00 | The PCE Shop |
| 175. | 292457 | 2/1/2002 | 3/1/2002 | 5,000.00 | Siew Mei Chuen |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 176. | 292458 | 2/1/2002 | 3/1/2002 | 5,000.00 | Siew Mei Chuen |
| 177. | 292456 | 4/1/2002 | 4/1/2002 | 5,000.00 | Siew Mei Chuen |
| 178. | 292459 | 4/1/2002 | 4/1/2002 | 5,000.00 | Siew Mei Chuen |
| 179. | 187350 | 4/1/2002 | 7/1/2002 | 3,350.00 | The PCE Shop |
| 180. | 292460 | 7/1/2002 | 81/2002 | 5,000.00 | Siew Mei Chuen |
| 181. | 292421 | 7/1/2002 | 8/1/2002 | 5,000.00 | Siew Mei Chuen |
| 182. | 292462 | 7/1/2002 | 8/1/2002 | 5,000.00 | Siew Mei Chuen |
| 183. | 292465 | 8/1/2002 | 9/1/2002 | 500.00 | Chan Koo Yen |
| 184. | 292463 | 8/1/2002 | 9/1/2002 | 1,700.00 | The PCE Shop |
| 185. | 292464 | 8/1/2002 | 9/1/2002 | 5,000.00 | Chan Koo Yeng |
| 186. | 292466 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 187. | 292467 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 188. | 292469 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 189. | 292468 | 11/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 190. | 292470 | 14/1/2002 | 16/1/2002 | 5,000.00 | Siew Mei Chuen |
| 191. | 292471 | 14/1/2002 | 16/1/2002 | 5,000.00 | Siew Mei Chuen |
| 192. | 292472 | 18/1/2002 | 22/1/2002 | 3,350.00 | The PCE Shop |
| 193. | 292473 | 23/1/2002 | 24/1/2002 | 5,000.00 | Siew Mei Chuen |
| 194. | 292475 | 23/1/2002 | 24/1/2002 | 5,000.00 | Siew Mei Chuen |
| 195. | 292476 | 24/1/2002 | 25/1/2002 | 2,750.00 | The PCE Shop |
| 196. | 292478 | 30/1/2002 | 31/1/2002 | 5,000.00 | Siew Mei Chuen |
| 197. | 292479 | 30/1/2002 | 31/1/2002 | 5,000.00 | Siew Mei Chuen |
| 198. | 292481 | 31/1/2002 | 4/2/2002 | 5,000.00 | Siew Mei Chuen |
| 199. | 292485 | 31/1/2002 | 4/2/2002 | 5,000.00 | Siew Mei Chuen |
| 200. | 292482 | 1/2/2002 | 4/2/2002 | 3,800.00 | Formico Sdn Bhd |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 201. | 292483 | 1/2/2002 | 4/2/2002 | 4,800.00 | Formico Sdn Bhd |
| 202. | 292487 | 6/2/2002 | 7/2/2002 | 5,000.00 | Siew Mei Chuen |
| 203. | 292488 | 6/2/2002 | 7/2/2002 | 5,000.00 | Siew Mei Chuen |
| 204. | 292466 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 205. | 292467 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 206. | 292469 | 10/1/2002 | 11/1/2002 | 5,000.00 | Siew Mei Chuen |
| 207. | 292494 | 11/2/2002 | 14/2/2002 | 5,000.00 | Siew Mei Chuen |
| 208. | 292495 | 11/2/2002 | 14/2/2002 | 5,000.00 | Siew Mei Chuen |
| 209. | 292471 | 14/1/2002 | 16/1/2002 | 5,000.00 | Siew Mei Chuen |
| 210. | 292472 | 18/1/2002 | 22/1/2002 | 3,350.00 | The PCE Shop |
| 211. | 292473 | 23/1/2002 | 24/1/2002 | 5,000.00 | Siew Mei Chuen |
| 212. | 292497 | 22/2/2002 | 27/2/2002 | 5,000.00 | Siew Mei Chuen |
| 213. | 292499 | 22/2/2002 | 27/2/2002 | 5,000.00 | Siew Mei Chuen |
| 214. | 293561 | 28/2/2002 | 10/3/2002 | 5,000.00 | Siew Mei Chuen |
| 215. | 293562 | 28/2/2002 | 10/3/2002 | 5,000.00 | Siew Mei Chuen |
| 216. | 293563 | 28/2/2002 | 10/3/2002 | 5,000.00 | Siew Mei Chuen |
| 217. | 293567 | 6/3/2002 | 8/3/2002 | 4,290.00 | The PCE Shop |
| 218. | 293570 | 8/3/2002 | 9/3/2002 | 4,290.00 | The PCE Shop |
| 219. | 293571 | 14/3/2002 | 14/3/2002 | 5,000.00 | Siew Mei Chuen |
| 220. | 293572 | 13/3/2002 | 19/3/2002 | 3,800.00 | Formico Sdn Bhd |
| 221. | 292500 | 14/3/2002 | 19/3/2002 | 4,290.00 | The PCE Shop |
| 222. | 293573 | 13/3/2002 | 19/3/2002 | 4,500.00 | Formico Sdn Bhd |
| 223. | 293574 | 13/3/2002 | 19/3/2002 | 4,800.00 | Formico Sdn Bhd |
| 224. | 293575 | 13/3/2002 | 19/3/2002 | 5,000.00 | Formico Sdn Bhd |
| 225. | 293579 | 20/3/2002 | 21/3/2002 | 5,000.00 | Siew Mei Chuen |

| No. | Cheque No. | Date | Date Cleared | Amount (RM) | Payee |
|---|---|---|---|---|---|
| 226. | 293580 | 21/3/2002 | 22/3/2002 | 5,000.00 | Siew Mei Chuen |
| 227. | 293581 | 21/3/2002 | 22/3/2002 | 5,000.00 | Siew Mei Chuen |
| 228. | 293583 | 21/3/2002 | 23/3/2002 | 4,970.00 | The PCE Shop |
| 229. | 293577 | 10/3/2002 | 25/3/2002 | 500.00 | Chan Koo Yeng |
| 230. | 293576 | 10/3/2002 | 25/3/2002 | 5,000.00 | Chan Koo Yeng |
| 231. | 293586 | 28/3/2002 | 26/3/2002 | 3,000.00 | Siew Mei Chuen |
| 232. | 293584 | 25/3/2002 | 26/3/2002 | 5,000.00 | Siew Mei Chuen |
| 233. | 293585 | 25/3/2002 | 26/3/2002 | 5,000.00 | Siew Mei Chuen |
| 234. | 293589 | 1/4/2002 | 2/4/2002 | 4,200.00 | The PCE Shop |
| 235. | 293587 | 26/3/2002 | 3/4/2002 | 4,800.00 | Formico Sdn Bhd |
| 236. | 293588 | 26/3/2002 | 3/4/2002 | 4,800.00 | Formico Sdn Bhd |
| 237. | 293590 | 2/4/2002 | 5/4/2002 | 5,000.00 | Siew Mei Chuen |
| 238. | 293591 | 2/4/2002 | 5/4/2002 | 5,000.00 | Siew Mei Chuen |
| 239. | 293592 | 4/4/2002 | 9/4/2002 | 4,710.00 | The PCE Shop |
| 240. | 293593 | 10/4/2002 | 11/4/2002 | 5,000.00 | Siew Mei Chuen |
| 241. | 293594 | 10/4/2002 | 11/4/2002 | 5,000.00 | Siew Mei Chuen |
| 242. | 293595 | 10/4/2002 | 11/4/2002 | 5,000.00 | Siew Mei Chuen |
| 243. | 293596 | 10/4/2002 | 11/4/2002 | 5,000.00 | Siew Mei Chuen |
| 244. | 293597 | 11/4/2002 | 12/4/2002 | 5,000.00 | Siew Mei Chuen |
| 245. | 293598 | 11/4/2002 | 12/4/2002 | 5,000.00 | Siew Mei Chuen |
| 246. | 293599 | 11/4/2002 | 12/4/2002 | 5,000.00 | Siew Mei Chuen |
| 247. | 293600 | 11/4/2002 | 12/4/2002 | 5,000.00 | Siew Mei Chuen |
| 248. | 292491 | 16/4/2002 | 17/4/2002 | 5,000.00 | Siew Mei Chuen |

5. The payments referred to in paragraph 4 above were made by the Defendant in breach of the express and/or implied terms of the said contract.

PARTICULARS

(a) The Plaintiff did not draw the said cheques or authorize the drawing thereof and the signature thereon was forged. In the premises the Defendant had no authority to pay the said cheques.

(b) The Defendant failed to take all necessary precautions to protect the Plaintiff from being defrauded.

(c) The Defendant made payments on cheques which were irregular and ambiguous in form;

(d) The Defendant made payments on the said cheques contrary to the mandate given by Plaintiff.

(e) The Defendant made payments when the Defendant had grounds for believing that the funds of the Plaintiff were being misappropriated taking into account in particular but not limited to the defendants knowledge of the signatories, the amount involved, the presence of unusual features and the scope and means for making reasonable inquiries.

6. By reason of the matters aforesaid the plaintiff has suffered loss and damage.

7. Wherefore the Plaintiff claims:

(a) a declaration that the Defendant is not entitled to debit the Plaintiff's current account with the amount of the respective cheques as enumerated in paragraph 4 of the statement of claim amounting to RM1,091,921.78;

(b) payment of the sum of RM1,091,921.78 as due and owing by the Defendant to the Plaintiff;

(c) interest on the respective sum as stated in the respective cheques as enumerated in paragraph 3 4 of the Statement of Claim from the date of payment out of the account to the date of judgment;

(d) interest on the judgment sum from date of judgment to date of full and final payment;

(e) cost;and

(f) such further relief as is deemed fit by this Honourable Court.

**[2]** It must be noted that: (i) as early as the Year 1985, the Privy Council in the case of *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others* [1985] 2 All ER 947 had, in an immutable term, stated that bank is contractually liable if it honours cheques which are not mandated by the customer, and the bank cannot raise negligence of customer in allowing the state of affairs to happen or to continue unless there is express agreement to contrary which has been clearly brought to the notice of the customer and not purely by general exclusion clauses; (ii) the Privy Council in the judgment did not deal with the defence to bankers like that provided under ss. 24 and 73A (73A was only inserted in 1998) of Bills of Exchange Act 1949 (BEA 1949) which reads as follows:

**Section 24**

Subject to the provisions of this Act where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

**Section 73A**

Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or **negligently contributes** to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value. (emphasis is mine);

(iii) it must be stated here that the phrase 'negligently contributes' has no relevance to the jurisprudence relating to contributory negligence which relates to sharing of liability. The phrase relates to conduct which is a relevant fact which needs to be taken into

consideration under the Evidence Act 1950 to determine absolute defence in respect of the relevant transaction. It must be said here that the phrase 'negligently contributes' is a statutory concept relating to negligence introduced by s. 73A; (iv) the Supreme Court had an opportunity to deal with the Privy Council decision and s. 24 of the BEA 1949 in the case of the *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 and accepted the doctrine of immutability as stamped by the Privy Council notwithstanding the fact that there were cases in the commonwealth jurisdiction which did not subscribe to the immutability concept *per se*, and in cursory manner accepted some narrow exception as advocated in s. 24 of the BEA 1949; (iv) by reason of ss. 24 and 73A have not been dealt with in a comprehensive manner by the apex court, there was veritable explosion of cases attempting to explain the immutable concept under the contract, and the acceptability of the defence related to negligence and/or its like related to the relevant sections; (v) Justice Nallini Pathmanathan J in an articulate judgment cited as *Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997 and Justice Lee Swee Seng JC in *Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* [2011] 1 LNS 414 have captured most of the relevant cases in Malaysia and elsewhere which dealt with the jurisprudence relating to this area of law. Her Ladyship has taken the view that s. 73A has statutorily altered or amended the common law position and provides a complete defence to the bank subject to the facts of the case. The learned Judicial Commissioner has taken the view that s. 73A can only go towards mitigating or reducing the damages payable by the defendant in view of contributory negligence of the plaintiff but not to absolve the defendant of a breach of its strict liability not to pay out on a forged cheque.

**[3]** I must say here that the above two decisions and the cases discussed therein have expressed various views and exposition based on jurisprudence most of which await apex seal to stand as a binding precedent.

**[4]** It must also be noted that on similar facts as the instant case and involving also the plaintiff, His Lordship Ramly Ali J (as he then was) in *Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 249; [2009] 7 AMR 671 has dealt with s. 73A of the BEA 1949 and held *inter alia* as follows:

1. At all times, the defendant had complied with the terms stated with regard to the opening of the plaintiff's current account, namely that with regard to cheques for the amount of RM5,000 and below, a signature of any one of the four signatories as indicated in P4 was sufficient. [see p 674 para 7 line 24 – para 8 line 40]

2. The evidence also clearly showed that the plaintiff's employee, one Juliana Siew ("Siew") who was not expressly named by the plaintiffs as its authorised representative, had by conduct, represented herself as the authorised representative of the plaintiff to liaise with the defendant on all banking matters in relation to the plaintiff's current account with the defendant. Siew was also named in P4 as the contact person. [see p 674 para 9 line 42 – p 675 para 9 line 7]

3. In the absence of any letter from the plaintiff appointing or naming an authorised representative, and from Siew's conduct of liasing with the defendant on all banking matters, it was reasonable for the defendant to infer that Siew was the authorised representative of the plaintiff in relation to banking matters or in respect of the operation of the current account with the defendant. [see p 675 para 10 line 8 – para 11 line 18]

4. There was no evidence that the defendant received any calls from the plaintiff to stop payment of the cheques. [see 675 para 12 lines 20-30]

5. On a balance of probabilities, it was clear that the disputed cheques were encashed by the defendant in its ordinary course of business and on good faith. The defendant had complied with all the normal procedures for that purpose and there was no element of negligence or careless conduct by the defendant's officers. Sections 82 (1), 85 (1) and 95 of the Bills of Exchange Act 1949 (the Act) are sections which apply favourably to the defendant's case. [see p 676 para 16 line 36 – p 677 para 21 line 18]

6. Any forgery or fraud if at all, was committed by Siew and was contributed to by the plaintiff's own negligence as the plaintiff had failed to supervise Siew and monitor her duties as its accountant/corporate administrator. The plaintiff had also failed to conduct checks on its cheque books which were issued by the defendant and to check all banking

A transactions carried out with the defendant on a regular basis. In short, the plaintiff had clearly failed to exercise due care in protecting its own interests from any misconduct of its own employees. [see p 677 para 23 line 30 – p 678 para 24 line 18]

B 7. Section 73A of the Act which deems a forged or unauthorised signature on a cheque as being a signature of the person it purports to be in favour of the person who in good faith pays the cheque, where the person whose signature it purports to be knowingly or negligently C contributes to the forgery or making of the unauthorised signature, was applicable to the facts of the present case. [see p 678 para 26 lines 35-43].

**[5]** The cases parties have relied on are set out in the annexure to the judgment.

D

## Brief Facts

**[6]** The plaintiff's case is as adumbrated in the statement of claim as set out above. The defendant's case is set out in encl. 45 and E reads as follows:

1. No breach of contract or mandate by the defendant in paying the impugned cheques. The signatures on the cheques were the signatures of one the plaintiff's authorized signatories as shown in the specimen signature card for the plaintiff's F account.

2. The plaintiff's failed to notify the defendant of any discrepancy within 14 days upon receiving the bank statements for the account. Consequently, the plaintiff should be stopped from filing this suit.

G

3. The signatures on the impugned cheques should be deemed as valid signatures of the plaintiff's signatories for the account pursuant to Section 73A of the Bills of Exchange Act 1949. The plaintiff's negligence had facilitated the forgery of the signatures:

H

(a) The plaintiff's failed to notify the defendant of the alleged forgery from 2.01.2001 to 16.04.2002 (1 year and 3 months);

I

(b) Only on 11.12.2002, the defendant received a notice of demand from the plaintiff's solicitors regarding the alleged forgery;

(c) The plaintiff failed to inform the defendant of any discrepancy within 14 days from the date the plaintiff received the bank statements;

(d) The plaintiff failed to check its cheque books. If regular checking is done, it would have traced the forgery immediately; and

(e) The plaintiff's signatories should have discovered the forgery upon signing other cheques from the same cheque books.

**[7]** The learned counsel for the defendant in the reply summarises the plaintiff's case and issues as follows:

3. I have read my learned friend's submission. I believe that I do him no injustice by summarising his arguments as follows:

(a) in so far as the plaintiff's case is concerned, the signatures on the impugned cheques have been proven to be not the signatures of PW2;

(b) regarding the first element of the defendant's Section 73A defence (the plaintiff's negligence facilitating forgery):

(i) there is no proof that the monthly bank statements had been sent to the plaintiff; and

(ii) the plaintiff has no duty to police its own staff;

(c) on the element of the defendant's "good faith" in making the payment, which is the second requirement of Section 73A, the plaintiff's counsel submits that defendant bank had shut its eyes to the obvious facts of dishonesty and had failed to make inquiries as an honest bank ought to have done.

(d) the plaintiff's counsel criticises the defendant's employees (DW1 to DW14) on the issue of cheques drawn for the sum of RM5,000.00 saying that their testimony does not reflect the actual mandate.

A

4. I pause here to say that for the purposes of this submission, I will not take issue with the contention that the signatures on the cheques were not the signatures of PW2.

5. Hence, the only issues for Your Lordship's adjudication are:

B

(a) whether the plaintiff were negligent; and

(b) whether the defendant acted in good faith.

## Preliminaries

C **[8]** Four witnesses gave evidence for the plaintiff and fifteen witnesses for the defendant. As far as the primary facts are concerned, much of it is undisputed and is similar to the one dealt with by His Lordship Justice Ramly, and has been taken up by the counsel in their respective submission in detail and I do not D wish to repeat the same.

**[9]** The cheques honoured were for the mandated sum except one which was withdrawn for the sum of RM35,357. The defendant's defence is two folds. One is that they have a statutory defence under s. 73A of the BEA 1949 in that the plaintiff had E acted negligently. The other is that the plaintiff is in breach of express contractual terms contained in the monthly statement of account, and in consequence the defendant is relieved from liability.

**[10]** It must also be noted that the plaintiff at the commencement F of trial raised a preliminary issue and that has been adequately dealt in the submission by both parties and I find no merits on the plaintiff's preliminary objection. The factual matrix of the case and the evidence has been set out by the learned counsel for the defendant and much judicial time will be saved if it is repeated. G The said factual matrix in encl. 48 reads as follows:

13. At all material times, the plaintiff maintained a current account with the defendant's branch in Lucky Garden, Bangsar, Kuala Lumpur.

H

14. When the account was opened with Bank Bumiputra Malaysia Berhad ('BBMB'), the account number was 1150326914. Subsequently, after the merger of BBMB and Bank of Commerce, the account number was changed to 1427-0003269-05-4.

I

15. At the material time, the mandate for the account was as follows:

    (a) for amounts up to the sum of RM5,000.00, each cheque must be signed by one (1) director; and

    (b) for amounts exceeding RM5,000.00, each cheque must be signed by two (2) directors.

16. Between 4th January 2001 and 17th April 2002 (a period spanning 15 ½ months), the defendant bank honoured 248 cheques drawn on the plaintiff's current account (the impugned cheques). The total sum paid out on the cheques amounted to RM1,091,921.78.

17. The plaintiff alleges that its corporate administrator, one Juliana Siew had forged the signature of John E. Dixon, who was one of the authorized signatories and a director of the plaintiff.

18. The signatures on the impugned cheques looked like the signatures of Mr John E. Dixon.

19. The plaintiff has two (2) addresses:

    (a) No. 6 Jalan Telawi Lima Bangsar Baru, Kuala Lumpur; and

    (b) No. 70 & 72 Jalan 27/70A, Desa Sri Hartamas, Kuala Lumpur.

20. The defendant, in its usual course of business, sent monthly bank statements to the plaintiff by ordinary post to the plaintiff's addresses in Bangsar and Desa Seri Hartamas. None of the statements were returned to the defendant, which is an indication that the statements had reached the plaintiff.

21. In clause 4 of the account application form, the plaintiff agrees:

    > ... agree to examine the Statement of Account sent to us/ me and notify the Bank of any errors, irregularities or discrepancies in the said Statement of Account ...

22. There was no objection by the plaintiff to the defendant within that 15 1/2 month period of time in respect of the transactions recorded in the bank statements.

23. In the same clause 4 of the application form, the plaintiff agrees:

> ... also to notify the Bank if I/we fail to receive such monthly statements ...

24. Plaintiff failed to notify the defendant despite alleging at the trial that it did not receive the bank statements.

25. The sum defalcated by Juliana Siew was close to RM1.1 million, higher than the net profit of the plaintiff in 1999 and approximately 1/3 of its turnover for the same year and higher than the profit before taxation in 2000.

26. For the period from January 2001 to September 2001, only Juliana Siew was entrusted with keeping the cheque books and drawing the cheques even though she was only a corporate administrator.

27. Nobody in the plaintiff company supervised Juliana Siew. She reported to the Board of Directors. None of the directors were executive directors.

28. Cheong Lai Hoong @ Christine (PW3) had been appointed as the plaintiff's account executive from October 2001. She had access to the plaintiff's cheque books and cheque stubs. She also drew cheques on behalf of the plaintiff on regular basis. Despite this, only in July 2012, the fraud was discovered.

29. At the material time, PW3, as the plaintiff's sole account executive prepared and presented to the plaintiff's board of directors the management accounts showing *inter alia*, inflow and outflow of the plaintiff's funds, without checking and/or sourcing the bank statements.

30. PW3 made no attempt to verify the particulars shown on the cheques stubs in the custody of the plaintiff, despite having access to these documents.

**[11]** I have heard the evidence, read the documents and submission of the parties in detail. Both the learned counsels have provided a detailed submission relating to the facts, evidence, and law. The court is grateful. I do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the plaintiff, I take

the view that the plaintiff's claim must be allowed only as to the part in respect RM35,357 with interest. My reasons, *inter alia*, are as follows:

(a) It must be said that the Privy Council's decision in *Tai Hing Cotton Mills Ltd (supra)* has been widely followed in many jurisdiction in relation to the contractual duty between the bank and customer. And the issue of negligence of the customer was seen as no answer for wrongful payment on forged cheques unless it was otherwise agreed. The position is similar in India. The Supreme Court of India in *Canara Bank v. Canara Sales Corpn* AIR 1987 SC 1603 has dealt with the jurisprudence relating to forged cheques and other relevant cases inclusive of the Privy Council's decision. The learned author of *Tannan's Banking Law and Practice in India*, 22nd edn. 2008 at p. 411 says:

> In *Canara Bank v. Canara Sales Corpn (supra)*, the Supreme Court held that the bank cannot debit the amount of forged cheques to the customer's account. The bank cannot expect the customer to look into the passbook or the statement of account so minutely. The statements sent by the bank are either not readable, decipherable or legible. The relation between the banker and customer is based on trust and when forged cheques are presented for payment, there is no duty for the customer to inform the bank about the fraud committed of which he has no knowledge. The customer can be held liable only when the customer had the knowledge about the fraud. Mere inaction on the part of the customer cannot absolve the bank from its liability to the customer and that by itself cannot cast a liability on the customer. The Court did not accept the bank's contention that when the customer had confirmed the balance in his account and also does not raise objection as to the statement of account then the entries should be deemed to be final and such entries cannot be re-opened for reconstruction.

(b) It must be noted that in India they have a similar provision like s. 24 of the BEA 1949, and they have recognised the limited exception to the common law position. The learned author of Tannan's Banking Law and Practice in India *(supra)* at p. 520 says:

A The legal position in respect of a cheque bearing a forged signature purporting to that of the drawer, is very ably summarised by Ramaswamy, J in *Abbu Chettiar v. Hyderabad State Bank* (1954) 14 Com Cases 221: AIR 1954 Mad 1001:

> (i) It is for the customer to establish affirmatively that the signature on the disputed cheque is not that of the customer but a forgery. (ii) If the drawer's cheque is forged or unauthorised, however clever to forgery is, the banker cannot debit his customer's account in case he pays the sum unless he establishes adoption or estoppels. (iii) What amounts to adoption or estoppels is dependent upon the circumstances of each case. (iv) In order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss. (v) The banker cannot set-up wither estoppel or adoption if his own conduct or negligence has occasioned or contributed to the loss, the well-settled principle being that where one of two innocent parties must suffer for the fraud of a third, that party should suffer whose negligence facilitated the fraud.

(c) In *Khoo Tian Hock & Anor v. Oversea-Chinese Banking Corporation Limited* [2000] 4 SLR 673, the Singapore court had an opportunity to consider the proposition stated in the Privy Council case. On the facts, the court found that the customer had breached the contractual duty of care and in consequence, refused to follow the Privy Council decision. And the Singapore Court, *inter alia*, held that:

> As for the plaintiffs, they as customers, owed the defendant bank a general duty not to facilitate fraud which duty extended beyond the mere drawing of cheques. This duty arose as an implied term in the contract between a bank and its customers. From there, the court then considers on the facts of each case, whether there was a breach of that duty and if so, whether the breach caused the loss. The position enunciated in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank & Ors* [1986] AC 60 that a customer's duty was limited to (i) exercising due care in drawing cheques so as not to facilitate fraud or forgery and (ii) notifying the bank immediately of any unauthorised cheques of which he had become aware, and further that there was no wider duty on a customer to prevent forged cheques from being presented to his bank for payment should not be followed because to do so would mean that a customer was

> entitled to sue his bank with impunity regardless of the most reprehensible negligence on his part which could not be right even though the business of banking was that of the bank and not the customer.

(d) In India or Singapore, there is no equipollent section to s. 73A of the BEA 1949. In addition, it must be said that the Privy Council's decision did not exclude contractual duty not to commit negligent act or its like when the contract expressly provides for not to do such act or neglect. If there is a legal duty of care, breach of it may give rise to cause of action in contract as well as negligence, as negligence strictly means the breach of legal duty to take care (see *Skyring v. Greenwood* (1825) 4 B & C 281). The Privy Council's decision did not exclude such a contractual duty, and at p. 957 rejecting the implied term submission had this to say:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at p. 587:

> Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in Macmillan [1918] AC 777 and Greenwood [1933] AC 51 can be implied into the banking contract in the absence of express terms to that effect, the banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

(e) In my view, s. 73A was introduced to arrest the immutable concept advocated by the Privy Council and introduce statutory defence to the bank in case of negligent contribution (negligently contributes) as opposed to negligence *per se* thereby making an inroad into the common law position that negligence of the customer per se will not stand as a defence unless it is contractually provided for. The distinction between the concept of negligence and 'negligently contributes' must be distinguished. This is reflected in the Hansard where the Deputy Finance Minister in introducing the Amendment Bill in 1997, had this to say:

RANG UNDANG-UNDANG BIL PERTUKARAN (PINDAAN) 1997

Bacaan Kali Kedua dan Ketiga
Timbalan Menteri Kewangan
[Dato' Dr. Affifudin bin Haji Omar]:

> Tuan Yang di-Pertua, saya mohon mencadangkan iaitu Rang Undang-undang bernama suatu rang undang-undang Akta Bil Pertukaran (Pindaan) 1997 iaitu satu akta untuk meminta Akta Bil Pertukaran 1949 dibacakan untuk kali yang kedua.

Tuan Yang di-Pertua, Akta Bil Pertukaran 1949 iaitu Akta 204 merupakan perundangan yang tunggal di Malaysia yang memperuntukkan rangkaian undang-undang mengenai instrumen-instrumen boleh niaga seperti bil pertukaran, cek dan nota janji. Selain daripada itu, akta ini adalah juga rangka perundangan asas bagi urusan bank dan sistem pembayaran di Malaysia. Maka selaras dengan perubahan-perubahan yang berlaku dalam sistem penjelasan cek dan urusan bank, peruntukan-peruntukan Akta Bil Pertukaran 1949 perlu diubahsuaikan ...

... Salah satu lagi cadangan pindaan adalah berhubungan dengan isu tandatangan palsu atau tandatangan yang telah diperbuat tanpa kuasa pada cek. Suatu bank yang membuat bayaran atas suatu cek yang mengandungi tandatangan palsu adalah bertanggungan sepenuhnya bagi kerugian yang ditanggung oleh pelanggannya. Ini adalah berdasar prinsip bahawa bank tersebut tidak mempunyai mandat secara nyata atau tersirat untuk membuat bayaran tersebut. Prinsip undang-undang di Malaysia dalam hal ini adalah berdasarkan kepada Common Law. Seseorang pelanggan hanya mempunyai dua kewajipan kepada banknya iaitu:

(i) ditegah daripada menulis ceknya dengan cara yang memudahkan penipuan atau pemalsuan; dan

(ii) memaklumkan kepada banknya tentang apa-apa pemalsuan cek dari akaunya dengan seberapa segera setelah ia mengetahui mengenai pemalsuan tersebut.

Berdasarkan prinsip di atas, pelanggan bank tidak mempunyai kewajipan untuk mengambil langkah berhati-hati dalam pengurusan am perniagaanya untuk mencegah pemalsuan oleh kakitangannya. Seorang pelanggan juga, tidak mempunyai kewajipan untuk memeriksa penyata bulanan bank untuk memastikan bahawa akaunnya dikendalikan secara wajar dan patut.

Dalam menentukan liabiliti bank dalam hal ini, fakta bahawa pelanggan tersebut telah bertindak secara cuai sehingga memudahkan pemalsuan tersebut adalah tidak material. Bank Negara Malaysia berpendapat, bahawa risiko yang harus ditanggung oleh suatu bank semasa membuat pembayaran atas sesuatu cek yang mengandungi tandatangan palsu atau yang telah diperbuat tanpa kuasa perlu dibataskan. Batasan yang dicadangkan berbangkit dalam keadaan di mana

tandatangan palsu atau yang telah diperbuat tanpa kuasa tersebut berpunca daripada kecuaian atau tindakan pelanggan yang disengajakan iaitu dengan tujuan untuk memudahkan pemalsuan tandatangan atau pembuatan tandatangan tersebut tanpa kuasanya.

Bank Negara Malaysia mendapati bahawa Uniform Commercial Code (UCC) di Amerika Syarikat mempunyai peruntukan yang menghalang seseorang daripada menidakkan kesahan cek tersebut sekiranya pindaan secara material terhadap cek atau tandatangan yang telah dibuat tanpa kuasanya akibat daripada kecuaiannya sendiri. Sehubungan dengan itu, adalah dicadangkan supaya pindaan yang menyerupai peruntukan UCC tersebut dibuat kepada akta.

Tuan Yang di-Pertua, secara ringkasnya pindaan-pindaan yang dicadangkan adalah perlu:

(i) memastikan pelaksanaan sistem penjelasan imej cek kebangsaan di mana pengemukaan cek dibuat melalui sistem imej;

(ii) menyeragamkan undang-undang dan menjelaskan apa-apa konflik berkenaan cek yang dipalang akaun penerima dengan memperuntukkan bahawa cek yang dipalang akaun penerima tidak boleh dipindahmilik; dan

(iii) membataskan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa sekiranya tuan punya cek itu sendiri dengan sengaja telah bertindak secara cuai dan mempermudahkan pembuatan tandatangan palsu tersebut.

Tuan Yang di-Pertua, saya ingin membawa perhatian Dewan yang mulia ini kepada beberapa pindaan utama yang dicadangkan.

Fasal 2 bertujuan untuk mengadakan peruntukan baru Seksyen 73A. Peruntukan baru ini bertujuan untuk mengadakan peruntukan berhubungan dengan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa.

Sekiranya tandatangan palsu atau yang diperbuat tanpa kuasa adalah berpunca daripada kecuaian atau ketindakan yang disengajakan sehingga memudahkan pemalsuan atau tandatangan tersebut dibuat tanpa kuasa maka tandatangan tersebut akan disifatkan sebagai tandatangan orang yang cuai tersebut.

(f) Section 73A totally does not oust the common law position. If Parliament intended that it would have expressly stated so. The protection afforded to the customer at common law is still sustainable but with some restrictions. For example: (i) if a cheque has been forged the bank is liable (this part may relate to negligence); (ii) if the bank sends statement on monthly basis and the customer does not identify the discrepancy in the 1st, 2nd or 3rd month etc. (this is where the phrase 'negligently contributes' becomes operative), and allow the state of affairs to continue depending on the facts of each case, the bank may be able to rely on the statutory defence in respect of the relevant transaction provided it can satisfy the requirement set out in the section. It is not negligence *per se* that attaches liability but negligent contribution which causes the loss provides the defence reversing the common law position. In essence, a customer who is vigilant in checking the bank statement regularly need not fear if the cheque has been forged provided he complains within a reasonable time to arrest the continuing forgery.

(g) For purpose of clarity in respect of the above examples, it must be said that if the customer has been taken ill such as stroke or coma and is not in a position to check the monthly statement and inform the bank of any forgeries and even if it has been happening for a number of years, the bank may be liable as negligent contribution will not become operative on such facts even though there may be negligence in the conduct of the business affairs of the customer. In essence, it is a question of fact for the court to decide. I must say here again the Act says 'negligently contributes' and it must not be taken to read as contributory negligence. The difference is like apple and orange. Contributory negligence relates to sharing of liability. On the other hand, 'negligently contributes' relates to promoting a negligent act, or its like. If the bank can show that there was in fact negligent contribution on the part of the customers taking into consideration the circumstances of the case and the bank had paid out in good faith, the section will provide an absolute defence to a customer's claim in respect of the relevant transaction.

(h) Section 73A directly and/or indirectly has brought in a wider concept of duty requiring a customer to take reasonable precautions in the management of his business to prevent forgery and also a duty to check periodical bank statements and alert the bank to arrest forgery at the earliest opportunity failing which the bank may succeed by raising the s. 73A defence, notwithstanding the decision of the Privy Council which was encapsulated by our Supreme Court in *United Asian Bank Berhad (supra)*. In addition, any clauses express or implied which imposes duty on the customer not to be negligent or its like have to be given greater force and effect by the court in view of s. 73A which alters and amends the common law position to negate absolute liability on the bank unless the customer has acted diligently and reasonably on the facts and circumstances of the case. The Singapore case stated above has diligently reviewed all authorities in this area of jurisprudence in meticulous detail to find in favour of the bank, and that too to support the proposition that contractually a customer has an implied duty not to facilitate fraud. And the court had this to say:

> 223 I would add that I do not think that banks in Singapore are reluctant to add such a contractual term because of the fear of losing business. More often than not, the omission to do so is because they have not revised their standard terms or because another bank has been taken over by or merged with them and they have omitted to revise the standard terms of that other bank. It may well be that one should have no sympathy for a bank who fails to get its act together, but, on the other hand, I do not see why customers should get away with their conduct however negligent or reckless they may have been.
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> 224 As for the policy reason that the losses of the kind sustained are infinitesimal to banks compared with the large business they do whereas to the individual customer the loss would often be very serious, I am of the view that such a consideration can be addressed by not being too quick to find that the customer has been negligent or that the negligent conduct has caused the loss.
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> 225 In my view, the balance between the interests of the bank and the customer and the interests of justice would best be served if there is a wider duty of care but leaving the questions of negligence and causation to be determined according to the particular facts of each case.

(i) In the instant case, there was sufficient evidence that the monthly bank statements were regularly sent. There was also contractual obligation in express term for the plaintiff to examine the statement of account and notify the bank of any errors, or irregularities or discrepancies. Similar reminder was also stated in the monthly bank statements. The evidence was clear that plaintiff notwithstanding the contractual obligation has failed to take reasonable precautions in the management of the business to prevent continuing forgery and alert the bank to avoid s. 73A defence by the bank. The issues relating to negligent contribution by the plaintiff is well articulated by the learned counsel for the defendant and *inter alia* read as follows:

(a) the forgeries were not detected for the extraordinarily long period of 15 1/2 months;

(b) the amount defalcated was close to RM1.1 million, higher than the net profit of the plaintiff in 1999 and approximately 1/3 of its turnover for the same year – for this not to be noticed is indicative of the plaintiff's lackadaisical attitude;

(c) no one in the plaintiff company supervised Juliana Siew's handling of the plaintiff's cheques and there was no checks and balances in so far as she was concerned;

(d) no complaints were made to the defendant although the defendant sent the plaintiff bank statements on a monthly basis;

(e) if the bank statements did not reach the plaintiff, the plaintiff failed to notify the defendant at the material time despite its agreement in the account application form;

(f) the plaintiff accepted in toto Juliana Siew's illogical explanation that the "absence" of the bank statements for 15 1/2 months was due to the bank's merger;

(g) for the period from January 2001 to September 2001, only Juliana Siew was entrusted with keeping the cheque books and drawing the cheques even though she was only a corporate administrator;

A (h) although one Cheong Lai Hoong @ Christine had been appointed as the plaintiff's account executive from October 2001 with access to the plaintiff's cheque books and cheque stubs and drew cheques on behalf of the plaintiff on regular basis, the fraud was only detected in July 2012;

B (i) at the material time, every month Christine prepared and presented to the plaintiff's board the management accounts showing *inter alia*, inflow and outflow of the plaintiff's funds, without checking and/or sourcing the bank statements;

C (j) no attempt was made by Christine to verify the particulars shown on the cheques stubs in the custody of the plaintiff;

(k) there was no internal check and balance mechanism to prevent abuse and misuse of the plaintiff's cheques; and

D (l) there was a systemic failure in the plaintiff's organization facilitating the perpetration of the fraud for 15 1/2 months in a very large amount.

(j) I am in total agreement with the learned counsel for the defendant that the plaintiff had knowingly or negligently E contributed or facilitated the forgery and thereby made out a case to rely on one part of the statutory defence encapsulated in s. 73A. In respect of the other part relating to good faith in paying out the cheque, I am satisfied that the defendant has a system in place and has conducted themselves as a F reasonable and prudent banker dealing with the day-to-day affairs of the operation of the accounts of the plaintiff taking into account all the circumstances of the case and also the fact that villain, Juliana Siew, is not an unknown person to the plaintiff or the defendant in the day-to-day operation and G conduct of the plaintiff's business. And also the fact that the Act itself places a low threshold for the defendant to satisfy when relying on the term good faith. This is so because s. 95 of of BEA 1949 defines good faith as follows:

H A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

(k) It must be noted that when it relates to instruments relating to Bills of Exchange the threshold requirement for good faith I in English Law is very low, that is to say, once it is established that the holder took the instrument in good faith,

he is entitled to all the rights of a holder in due cause notwithstanding that he was careless, that he made no enquiry, and that he was informed of facts which would have led a reasonable man to make further inquiry, provided, however, that he had no notice of any defect in the transferor's title (see *Jones v. Gordon* (1877) 2 App Cas 616; *Auchteroni & Co v. Midland Bank, Ltd* [1928] All ER Rep 627).

(l) I agree with the learned counsel for the plaintiff that the cheque honoured for the sum of RM35,357 found at p. 114 of encl. 37 does not have two signatories and in that respect it is a breach of mandate given by the plaintiff and in consequence, the defendant is liable to reimburse the same with interest, and 73A defence will not assist the defendant.

**[12]** For reasons stated above, I allow the plaintiff's claim in part for the sum of RM35,357 with interest at 5 % per annum from the date of filing to the date of judgment and thereafter at the rate of 5% per annum from the date of judgment to the date of realisation. I make no order as to costs.

I hereby order so.